Supreme Court, U.S.
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No. 96-830

In the
Supreme Court of the United States
October Term, 1996

TOMMY J. ABBOTT, et al.,
Petitioners,

v.

PIPEFITTERS LOCAL UNION NO 522 HOSPITAL, MEDICAL, AND LIFE BENEFIT PLAN, et al.,
Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where there is abundant and undisputed evidence that the disproportionately high claims and expense history of one of two participating union locals jeopardized the financial viability of a welfare benefit plan, did the trustees of the plan violate the Employee Retirement Income Security Act ("ERISA") when they established a schedule of contribution rates formulated by the plan actuary which prospectively required higher contributions from members of that union local than from members of the other?

2. Is the action of the trustees which is described in the preceding question subject to review for compliance with ERISA's fiduciary duties, and, if so, what standard of review applies?

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The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 94 F.3d 236 and is reproduced in Appendix A at pages A-1 to A-12 hereto. It is referred to herein as *"Abbott* at A-___." The unreported decision of the District Court in this case is reproduced at Petitioner's Appendix B at pages App. 16-25, and is referred to herein as "Pet. App. B at _____."

COUNTER STATEMENT OF THE CASE

A. The History, Structure, and Terms of the Plan.

The Pipefitters Local Union No. 522 Hospital, Medical, and Life Benefit Plan (the "Plan") is an employee welfare benefit plan under the Employee Retirement Income Security Act of 1974 ("ERISA"), which is codified as amended at 29 U.S.C. §§ 1001-1461. *Second Amended Complaint,* Record on Appeal, Item No. 13, at 3 (hereafter, "Record: ___ at ___").

The Plan was established on August 1, 1955, by the Pipefitters Local Union No. 522, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, AFL-CIO of Louisville, Kentucky ("Local 522"). *Deposition of Joseph Warren*, Record: 27 at 4. In 1970, the members of Pipefitters Local Union No. 633, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO of Owensboro, Kentucky were permitted to join the Plan as a group. *Id.*, at 6 and 15. One of the terms under which the Owensboro group was admitted was that the Plan trustees would continue to be drawn exclusively from the Louisville group. *Id.*, at 25-26.

Section 6.01 of the Plan (Record: 78 at Ex. 2) provides that the Plan is to be administered by a group of trustees appointed in accordance with an Agreement and Declaration of Trust (the "Trust") (Record: 78 at Ex. 1). Section 9.02 of the Plan vests responsibility for "the administration and management" of the Plan in the trustees. This grant includes exclusive responsibility for the management and control of the assets of the Plan. Section 9.02 of the Plan also provides for a Plan actuary who, ". . . shall have the responsibility for establishing the actuarial assumptions and actuarial cost method used to determine the minimum contributions to be made to the Plan."

Section 10.01 of the Plan provides that, "Any rules, regulations, or procedures that may be necessary for the proper administration or functioning of this Plan that are not covered in this Plan or the Trust Agreement shall be promulgated and adopted by the Trustees."

Section 2.2 of the Trust grants to the trustees the power:

> To decide all questions or controversies arising in any manner or between any parties or persons in connection with the Health and Welfare Fund or the operation thereof, whether as to any claim for benefits made by any Employee, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or established by this instrument, or as to any writing, decision, instrument, or accounts in connection with the operation of the Health and Welfare Fund or otherwise. The decision shall be binding upon all persons dealing with the Health and Welfare Fund or claiming any benefits thereunder.

Section 2.3 of the Trust further empowers the trustees:

> To administer or delegate responsibility for the administration of this health and welfare plan . . . which shall set forth the benefits to be provided from the Trust Fund, the conditions of eligibility for such benefits, the terms of payment, and such other items as the Trustees shall deem it necessary to include.

Section 7.1 of the Trust vests administration of the Trust Fund "wholly in the Trustees" and grants the trustees the power to "obtain and evaluate all statistical and actuarial data which may be reasonably required with respect to the administration of the Health and Welfare Plan" and to make such other rules and regulations as may be necessary for the administration of the Plan.

Section 7.2(l) of the Trust authorizes the trustees to "[p]repare, promulgate and issue rules and regulations pertaining to application for benefits of the Fund, eligibility requirements to participate in the same and types and kinds of benefits to be secured from proceeds of the Fund." Section 7.2(n) authorizes the trustees "[t]o construe all provisions of this Agreement and the terms used herein and any con-

structions adopted by the Board of Trustees in good faith shall be binding upon all interested parties."

The Plan is primarily funded by contributions from the employers of Plan participants. At the time relevant to this dispute, each of the two participating locals negotiated its level of contributions in collective bargaining with the respective associations of employers for whom its members worked. Record: 78 at Ex. 2, p. VII-1. If a participant was not working at a given time, and thus not earning any employer contributions, the participant could make the contributions to the Plan so as to continue coverage under the Plan. Record: 78 at Ex. 2, p. II-1. The Plan paid scheduled benefits on claims made by participants. Record: 78 at Ex. 2, Articles III, IV, and V. Blue Cross - Blue Shield processed the claims. Record: 13 at 5.

As the Sixth Circuit Court of Appeals noted in its opinion, and as the Petitioners have failed to note in their statement of the case, there are no provisions in the Plan or Trust that prohibit differentiation between the two participating union locals and nothing in the Plan prohibited the trustees from instituting distinct contribution rates for the two participating locals. *Abbott*, A-3. The Plan and the Trust differentiate between the two locals for other purposes, such as the selection of trustees and alternate trustees, and each union local negotiated employer contributions separately from the other with no assurance of, or provision for, equal employer contributions.

B. The Plan's Financial Problems and the Actions of the Trustees.

In the 1988 Plan Year (ending July 31, 1988), the Plan suffered an "experience loss" (the amount by which benefits and expenses exceed contributions) of $122,970. Information sent by the Plan actuary to the trustees in March of 1990 indicated that the Plan had experienced an operational loss of $80,449.13 for the months of August through October 1989. The Plan was on its way to suffering an experience loss of $359,140 for the 1990 Plan Year (ending July 31, 1990). *Affidavit of Matthew Carlton*, Record: 78 at Ex. 21, pp. 2-3.

The trustees were alarmed at the magnitude of this loss trend and aware of their duty "to all people, to keep the thing solid and solvent," "to maintain the Trust in a solvent fashion," and to "pay attention to the financial aspects of the Trust so that it would be continued in a financially sound way . . . ." *Deposition of Dale Lafferre*, Record: 26 at 21; *Deposition of C. Vincent Schmidt*, Record: 25, at 14. As provided in the Plan, the trustees directed the Plan actuary to examine and report on the situation in May of 1990. *Deposition of Joseph Warren*, Record: 27 at 34.

The Plan actuary determined that for the 44 month period ending March 31, 1990, the total cost associated with claims by members of Local 633, the Owensboro local, exceeded contributions made on their behalf by approximately $1,223,913. *Affidavit of Matthew Carlton*, Record: 78 at Ex 21, pp. 2-3; *Memorandum from Plan Actuary Matthew Carlton to Plan Consultant Richard L. Wilson, dated May 21, 1990*, Record: 78, Ex. 13. This imbalance was not only threatening the financial viability of the Plan, it was requiring the members of the Louisville local to carry a radically disproportionate share of the financial burden of the Plan.

At a meeting held on May 22, 1990, the trustees considered the report of the Plan actuary, and decided that the members of Local 633, the Owensboro local, would have to either increase their contributions to the Plan or accept a reduction in benefits. *Deposition of Joseph Warren*, Record: 27 at 79-80; *Minutes of May 22, 1990, meeting*, Record: 78 at Ex. 15.

The trustees sought legal guidance in connection with this action. The Plan's attorney, Charles Isenberg, advised the trustees that " . . . the separate bargaining units could be charged different rates," and that "it did not cause . . . any concern" to him as the Plan's attorney. *Deposition of Charles Isenberg*, Record: 41 at 18, 56; *Deposition of Marvin Hammond*, Record: 24 at 20.

By memorandum dated May 30, 1990, the trustees advised the members of Local 633 of the status of the Plan, and of the decision that "both groups must remain in the black." The memorandum gave the members of Local 633 notice that a "substantial increase"

in their contribution levels would be effective on August 1, 1990, some two months later. *Deposition of Joseph Warren*, Record: 27 at 57; *Memorandum*, Record: 78 at Ex. 17.

On June 13, 1990, the Plan actuary prepared an updated comparison of total costs and negotiated payments for the Plan for the period August 1, 1986, through March 31, 1990. That comparison showed a deficit for the members of Owensboro Local 633 of $943,909, compared with a surplus of $337,432 for the members of Louisville Local 522. *Affidavit of Matthew Carlton*, Record: 78 at Ex. 21, pp. 2-3; *Deposition of Joseph Warren*, Record: 27 at 84-85; and *Memorandum*, Record: 78 at Ex. 18.

The trustees met on June 14, 1990, to discuss the next Plan Year. After reviewing the actuary's updated report, the trustees decided the amount by which the contribution level for members of Local 633 would have to be increased to maintain the level of benefits then in place. *Deposition of Joseph Warren*, Record: 78 at 85; *Memorandum from Richard L. Wilson*, Record: 78 at Ex. 19. By memorandum dated June 22, 1990, the trustees offered the members of Local 633 the option of either accepting the higher contribution rate or having a reduced level of benefits to correspond with the level of contributions then in effect. *Deposition of Joseph Warren*, Record: 27 at 55-56; *Letter from Trustees to Participants*, Record: 78 at Ex. 20.

A majority of the voting members of Local 633 voted to obtain insurance from another source. *Deposition of Norman Cole*, Record: 88 at 19. Thus, Local 633 left the Plan, as a group, and obtained other insurance at a rate comparable to the rate which had been set by the Plan's trustees. *Id.*

C. The Legal Proceedings.

The plaintiffs filed this action several months later on March 12, 1991. *Complaint*, Record: 1 at 1. The Court granted summary judgment as to Count III by Order entered February 4, 1994. Record: 64. The matter then came before the Court for trial on July 6, 1994. The parties agreed to a stipulated trial record of the pleadings on file, the

depositions in the case, and an agreed set of exhibits. Record: 78. The District Court, Senior District Judge Charles A. Allen, rendered Judgment for the defendants on all remaining counts on December 6, 1994, supported by Findings of Fact, Conclusions of Law and Memorandum Opinion. Record: 84; also found at *Appendix B to Petition for Writ of Certiorari.*

Relying on decisions from several Circuit Courts of Appeal, Judge Allen held that the action of the trustees was not subject to review under ERISA's fiduciary standards. Noting that Congress had decided that welfare benefit plans should not be subject to "a vesting requirement," Judge Allen stated, "[c]ase law makes it amply clear that modifications to a welfare benefit plan may be made without imposing liability on the trustees of the plan if the modifications were made for the purpose of helping or preserving the financial stability of the plan. . . . The fact that amendment of the plan may involve some discrimination among participants does not change this principle (so long as the amendment is prospective, of course, as it is in this case). Pet. App. B, 19-20.

Plaintiffs filed their Notice of Appeal on December 28, 1994. Record: 85. On August 29, 1996, the United States Court of Appeals affirmed the District Court. *Abbott,* A-1 to A-12. The Sixth Circuit determined that while ERISA's fiduciary standards did apply to the trustees' action because that action, "was an administrative one, squarely within the powers of the trustees to make, but one which did not 'modify' or 'amend' the plan. Thus, the trustees, in making this decision, did not act in a manner analogous to settlers of a trust, but, rather, as administrators exercising the discretionary authority granted to them under the plan." *Id.*, at A-8.

The Sixth Circuit proceeded to review and approve the trustees' action under the "arbitrary and capricious" standard of review established in *Firestone Tire & Rubber Co. v. Bruch,* 489 U. S. 101, 115 (1989), just as that standard had been similarly applied to a nearly identical situation by then-Judge Stephen Breyer in *Mahoney v. Board of Trustees,* 973 F.2d 968 (1st Cir. 1992). The Sixth Circuit stated:

> Thus, we are left with the simple inquiry whether there was a reasonable basis for the trustees' decision. The answer cannot seriously be debated. The trustees were faced with a situation in which the plan was suffering significant losses that were attributable to the claims history of only one local's members. In light of these losses, the trustees were obligated to increase the contribution rates. Nothing in the plan prohibited them from doing so by instituting distinct rates, and their decision to do so appropriately placed the burden of the increased costs on the participants whose claims experience was responsible for those costs.

Id., at A-9 to A-10. The plaintiffs have petitioned this Court for a writ of certiorari.

REASONS THE PETITION SHOULD BE DENIED

A. Introduction.

This case presents a situation in which the trustees of an ERISA welfare benefit plan acted to protect the financial viability of the plan which was jeopardized by the disproportionately high claims and expense history of one participating union local. The trustees acted on the basis of abundant and undisputed financial and actuarial data. They acted within the authority expressly granted them by the controlling plan documents and only after seeking legal advice. And they acted in a manner which was fair, rational, and prospective in application. Accordingly, both the District Court and the Circuit Court upheld the trustees' action against a variety of challenges asserted by the Petitioner under ERISA.

The Petitioners now seek to have the Supreme Court reconsider and overturn the factual finding of the Court of Appeals for the Sixth Circuit that no provisions of the plan documents prohibited the trustees' action. The Petitioners also contend that the Supreme Court should review this case because the Sixth Circuit either applied an incorrect standard of review or did not provide a thorough enough

discussion of the standard of review it did apply. The Petitioners strive, but fail, to demonstrate that the Sixth Circuit's decision is in conflict with decisions by other Circuits on the same issues. As is demonstrated below, there is no conflict between the Circuits on any issue presented by this case, and the decisions from other Circuits on which the Petitioners rely can be easily harmonized with the decision of the Sixth Circuit in this case.

When all else is stripped away, the question here is really one of basic trust law: Did the trustees act fairly and on a reasonable evidentiary basis? After carefully considering all the evidence, experienced judges on two courts found that they did. Petitioners can point to no provisions of either the Plan documents or ERISA which prohibit the actions taken. Accordingly, the Petition should be denied.

B. There is No Conflict with the Third Circuit's Epright Decision.

The first basis for certiorari which the Petitioners advance is a purported conflict between the Sixth Circuit's decision in this case and the decision of the Third Circuit in *Epright v. Environmental Resource Management, Inc. Health and Welfare Plan*, 81 F.3d 335 (1996). These decisions are not in conflict. In fact, when one examines the facts of each case, it becomes apparent that the two decisions are entirely consistent with each other.

Initially, it should be noted that the *Epright* decision and the Sixth Circuit decision in this case involve different provisions of ERISA. The *Epright* involved a claim for "improper denial of medical benefits . . . in violation of Section 502(a) of" ERISA. *Id.*, at 337. This provision is codified at 29 U.S.C. § 1132(a)(1)(B). This case involves a claim of breach of fiduciary duty pursuant to ERISA Section 504, which is codified at 29 U.S.C. § 1104. *Abbott*, at A-5. Thus, the two decisions concern two substantively different legal claims.

Nonetheless, the *Epright* decision and the Sixth Circuit decision in this case are completely harmonious. The *Epright* decision stands for the proposition that a plan sponsor improperly denies a claim for benefits when that sponsor arbitrarily disregards specific provisions

of a plan so as to deprive someone of an existing right to a benefit. The Sixth Circuit's decision in this case stands for the proposition that trustees, "acting squarely within [their administrative] powers," can take an action which may affect future rights to benefits, as long as there is a reasonable basis for the action and no plan provision prohibits the action. *Abbott*, at A-8. The two decisions stand easily side-by-side.

In *Epright*, an employer who sponsored a welfare benefit plan flatly disregarded the objective and unambiguous definition of "full-time employee" contained in the plan documents and attempted to deny benefits to an injured worker by arbitrarily characterizing the worker as "parttime." The worker had indisputably worked enough hours to attain the status of a "full-time employee" under the plan. The employer nonetheless ignored this clear plan provision and denied the worker's claim for benefits based on a "long-standing policy" pursuant to which the employer characterized employees as "part-time" as long as it chose to do so, even if the employees satisfied the plan's definition of "full-time." The Third Circuit held that this denial of benefits was unlawful because it controverted the plain language of the plan. *Epright*, 81 F.3d at 340. *Epright* did not involve a claim for breach of fiduciary duty as this one does, and the decision makes only a passing reference to ERISA's fiduciary standards. *Id.*, at 339.

This case does not arise from the denial of a claim for benefits under existing plan provisions like *Epright*, but instead involves a claim of breach of fiduciary duty related to future plan operation. This case is one in which the trustees made an administrative decision which was "squarely within the powers of the trustees to make." As the Sixth Circuit correctly noted, the decision of the trustees here, unlike the employers action in *Epright*, did not affect plan design or alter any existing plan terms. *Abbott*, at A -7. And here, as the Sixth Circuit repeatedly recognized, there are no specific and directly applicable plan provisions as in *Epright*. *Id.*, at A-3, A-7, A-8. No term of the Plan or Trust prohibits the trustees from differentiating between the two participating locals in setting contribution rates.

The Petitioners cannot identify any such prohibiting plan provisions and instead argue, unconvincingly, that such a prohibition should be inferred from the fact that the Plan's definitions of the terms "employee," and "union" do not differentiate between the two participating locals. But there is not, and never has been, an issue as to whether the members of Local 633 were "employees" or whether Local 633 was a participating "union." *Petition*, at 10. The only question is whether participating employees' contribution rates can vary based on the union local to which they belong.

The fact that there is no plan provision expressly authorizing differential rates is not significant where, as here, the plan documents expressly do authorize and empower the trustees to promulgate "rules, regulations, and procedures that may be necessary for the proper administration or functioning of this Plan that are not covered in this Plan or the Trust Agreement" and to "set forth the benefits to be provided from the Trust Fund the conditions of eligibility for such benefits, the terms of payment, and such other items as the Trustees shall deem it necessary to include." *Abbott*, at A-4; Record: 78 at Exs. 1 and 2.

Rather than retroactively attempting to justify a benefit denial which relied on a simplistic plan policy contrary to the plan's plain language, as in *Epright*, this case presents a prospective applied decision of the trustees, in exercise of a power specifically granted to them by the plan, to set contribution rates.

C. The Sixth Circuit Applied the Appropriate Standard of Review and There is no Conflict with the Decisions of Other Circuits.

After determining that the action of the trustees in this case was subject to review under ERISA's fiduciary standards, the Sixth Circuit reviewed the action to determine if it was "arbitrary and capricious." *Id.*, at A-8. The Sixth Circuit noted the Petitioners' argument that the trustees violated their fiduciary duty of loyalty because some of them were drawn from Local 522, and would therefore be favorably affected by the decision to implement the differential contribution rates. *Id.*, at A-9. The court observed that the Petitioners offered

no additional evidence on this point, that Local 633 agreed as a condition of its participation in the Plan that trustees would be drawn from Local 522, and that nothing in either ERISA or the Labor Management Relations Act forbade such an arrangement. *Id.* On these grounds, the Sixth Circuit concluded: "Nor will we infer that the trustees acted improperly merely because they necessarily would be affected by any decision which resolved the need to raise contribution rates." *Id.*

As authority for its application of the "arbitrary and capricious" standard, the Sixth Circuit relied on a 1992 First Circuit decision authored by now-Justice Stephen Breyer. *Mahoney v. Board of Trustees*, 973 F.2d 968, 971-73 (1992). *Mahoney* involved facts very similar to those of this case and presents the very same issue regarding the standard of review as is presented by this case. There, trustees of a pension plan significantly increased the size of retirement pensions but, in so doing, they divided the increases unevenly, treating longshoremen who had already retired less favorably than those who were still working. *Id.*, at 969. Writing for a unanimous panel, then-Judge Breyer, after considering the common law of trusts, several state court decisions, and the statutory regime governing the plan, rejected the argument that the trustees' action should be reviewed under a standard stricter than the "arbitrary and capricious" standard. *Id.*, at 973.

Petitioners argue that the Sixth Circuit's decision here, and, by implication, the decision of the First Circuit in *Mahoney*, are in conflict with decisions of the Fifth Circuit in *Martin v. Feilin*, 965 F.2d 660 (1991) and the Eighth Circuit in *Donovan v. Cunningham*, 716 F.2d 1455 (1983). The Petitioners do not cite to any particular portions of these cases to support their argument. Nor do Petitioners advise the Court that both *Martin* and *Donovan* involve fiduciaries' individual interests in transactions with employee stock ownership plans ("ESOP"). These ESOP cases involve facts and substantive legal provisions which are very different than those involved in this case. And, as then-Judge Breyer made clear in *Mahoney*, ESOP cases are distinguishable from this case because they involve conflicts between non-beneficiaries and beneficiaries, as opposed to the pur-

ported conflict among beneficiaries which is alleged here. *Mahoney*, 973 F.2d at 972-73.

In *Martin*, fiduciaries of an ESOP were accused of engaging in various corporate transactions which destroyed the sponsoring company and thereby rendered the ESOP worthless. The court began its legal analysis by noting that ERISA has special provisions concerning fiduciary transactions with ESOPs which are not applicable to other types of ERISA plans. *Martin*, 965 F.2d at 665. The issue in *Martin* was whether certain business transactions which arguably benefited the fiduciaries at the expense of the ESOP implicated the fiduciary standards applicable to ESOP fiduciaries. The only comments in *Martin* upon which the Petitioners could conceivably rely relate specifically to situations in which "insiders act for a closely held corporation's ESOP." Then, "courts should look closely at whether the fiduciaries investigated alternative actions and relied on outside advisors . . . ." *Id.*, at 671.

In *Donovan*, fiduciaries of an ESOP caused the ESOP to purchase stock from one of their number for more than its fair market value (or, "adequate consideration," the term used in ERISA). The Secretary of Labor alleged that these transactions violated ERISA. The issue before the court was whether the fiduciaries conducted a sufficient investigation to determine the fair market value of the stock they caused the ESOP to purchase. The court determined that they did not. *Donovan*, 716 F.2d at 1473. The Petitioners do not cite to any specific portion of the *Donovan* decision, nor do they explain how its holding conflicts with that of the Sixth Circuit in this case.

Nothing in either the *Martin* or the *Donovan* decision supports the Petitioners' contention that the Sixth Circuit here, and, by implication, Judge Breyer in *Mahoney*, erred by applying an "arbitrary and capricious" standard of review. Unlike those cases, this case does not involve the special situation presented by transactions between a business insider and an ESOP for which that insider is a fiduciary. Moreover, the reason for the Petitioners' lack of specific citation is that neither *Martin* nor *Donovan* really held that a stricter standard of review was required. Even if those decisions had so

held, Judge Breyer's conclusion in *Mahoney* would apply with equal force here:

> The cases that appellants cite for a "stricter standard" do not involve the kind of conflict at issue here. Rather, they concern conflicts not among the interests of different beneficiaries, but conflicts between (a) the interests of beneficiaries and (b) the interests of a nonbeneficiary. They involve, in the language of ordinary trust law, claimed breaches of the duty of loyalty to beneficiaries, not the duty of impartiality among beneficiaries. . . . We conclude, for the reasons stated, that we must review the trustees' action before us under an "arbitrary and capricious" standard.

Mahoney, 973 F.2d at 973 (citations omitted).

The Sixth Circuit's reliance on *Mahoney* in this case was well-founded. The decisions of the Fifth and Eighth Circuits in *Martin* and *Donovan* were made in cases which were both factually and legally dissimilar to this one. There is no conflict as Petitioners contend.

CONCLUSION

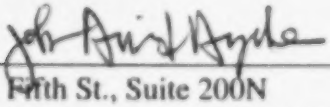
The Petitioners have failed to demonstrate any conflict between the decision of the Sixth Circuit in this case and the decision of any other Court of Appeals in any other case. Accordingly, there is no compelling reason for this Court to grant a writ of certiorari here. The Respondents therefore respectfully request that the Court deny the Petition for Writ of Certiorari in this action.

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Appendix A

No. 95-5063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
94 F.2d 236; 1996 U.S. App.LEXIS 22198;
996 FED App. 0283P (6th Cir.); 20 E.B.C. 1761

TOMMY J. ABBOTT, et al.,
Plaintiffs-Appellants,

v.

Pipefitters Local Union No.522 Hospital, Medical, and LIFE BENEFIT PLAN; TRUSTEES OF THE PIPEFITTERS LOCAL UNION NO. 522 HOSPITAL, MEDICAL, AND LIFE BENEFIT PLAN; and JOSEPH WARREN, in his official capacity as a trustee of the Pipefitters Local Union No. 522 Hospital, Medical, and Life Benefit Plan,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed August 29, 1996

Before: RYAN and NORRIS, Circuit Judges; JOINER, District Judge.*

Opinion: CHARLES W. JOINER, District Judge.

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* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

Plaintiffs, 147 members of Pipefitters Local 633, appeal the judgment against them in this action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 10011461. Plaintiffs claim that the trustees of the welfare benefit plan to which they belonged violated two provisions of ERISA by charging plaintiffs a contribution rate higher than that charged to plan members who belonged to Local 522. The district court concluded that the trustees permissibly could differentiate between the two locals in setting the contribution rates, and dismissed plaintiffs' claims. We affirm.

I.

A.

The essential facts are not in dispute. In 1955, Pipefitters Local 522, based in Louisville, Kentucky, established the Pipefitters Local No. 522 Hospital, Medical, and Life Benefit Plan (the "plan"). In 1970, members of Local 633, which is based in Owensboro, Kentucky, were permitted to join the plan as a group. The plan is a multi-employer, union-sponsored welfare benefit plan that pays scheduled medical, health, and life benefits on claims made by participants. The plan is funded primarily with contributions from the employers of plan participants. The amount of employer contributions is governed by the collective bargaining agreement entered into between the local and the association of employers for whom the local's members work, and is calculated as an hourly rate based on hours worked by each employee. If a participant does not work and thus does not earn employer contributions, he may make direct contributions to the plan to continue coverage. Prior to 1990, the contribution amount did not vary depending on the local to which the employee belonged; as of 1990, the hourly rate was $1.70.

In March 1990, the plan actuary reported an operational loss of $80,449 for the first three months of the 1990 plan year. Further investigation revealed that for the preceding 44-month period, the claims and expenses for Local 633 participants totaled $2,176,611, while contributions by or on behalf of these participants totaled only $1,232,702, resulting in a loss of $943,909. The contributions made

by or on behalf of Local 522 participants, on the other hand, exceeded their claims by $337,432. The plan thus suffered a net operational loss of $606,477 for this 44-month period. The plan ultimately suffered a loss of $359,140 for the 1990 plan year.

The trustees conferred with counsel, and then voted unanimously to require that each local operate in the black. The trustees promptly communicated their decision to the participants, and informed them as well that a significant increase in the contribution level would be implemented soon. After receiving the actuary's calculations, the trustees sent a letter to participants, stating that in order for each local to be self-supporting, Local 633 participants would be charged $3.36 per hour, and that Local 522 participants would be charged $1.90 per hour. The trustees further explained that if the participants did not pay the designated amounts, the schedule of benefits would be reduced to correspond with the amount paid per hour. Evidently treating the issue before them as one involving plan administration, the trustees did not formally amend the plan to institute the differentiated contribution rates. In response to the alternatives given to them, a majority of the Local 633 participants voted to obtain insurance from another source, and left the plan.

Plan Structure and Provisions

The Plan defines "union" as both Local 522 and Local 633. "Employee" and "eligible employee" are defined without reference to local affiliation. There are no provisions in the plan that authorize the trustees to differentiate between participants from the two locals in setting contribution rates, nor any provisions that prohibit differentiation between the two locals.

The permissible structure of a union-sponsored benefit plan such as the one involved in this case is governed by § 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5). As required by § 302(c)(5)(B), the plan is administered by a body of trustees, with employers and employees having equal representation. Local 633 joined the plan in 1970 with the understanding that the trustees of the plan would continue to be drawn from Local 522. The trust agreement states that the trustees are to be drawn from

Local 522 and the employers for whom that local's members work, and that Local 633 is entitled to one alternate trustee (who serves on a temporary basis in the absence of a regular trustee). In 1990, the two employer trustees were members of the employers association in Louisville, and the two employee trustees were the business manager and senior business representative of Local 522.

The trustees' powers and duties are detailed in both the plan and the trust agreement. Article IX of the plan states that the trustees are named fiduciaries, and imposes on them the duty to "act solely in the interest of Employees, Dependents, Survivors and Beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses." (Section 9.01.) Article VIII of the plan governs amendments, and provides that the plan "may be amended in any respect at any time . . . by a resolution adopted by a majority vote of the Trustees, effective as of the date set forth in the resolution[.]"[1] Article X states that "[a]ny rules, regulations, or procedures that may be necessary for the proper administration or functioning of this Plan that are not covered in this Plan or the Trust Agreement shall be promulgated and adopted by the Trustees."

The trust agreement grants broad powers to the trustees:

> To decide all questions or controversies arising in any manner or between any parties or persons in connection with the Health and Welfare Fund or the operation thereof, whether as to any claim for benefits made by any Employee, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or established by this instrument, or as to any writing, decision, instrument, or accounts in connection with the operation of

[1] Several limitations are set forth on the ability to amend, none of which is relevant to plaintiffs' claims. The plan may not be amended to change the requirements that the union and employers association have equal numbers of trustees; that there be an annual audit of the plan; and that no portion of the fund may be diverted to a use other than for the benefit of beneficiaries. These limitations derive from LMRA § 302(c)(5).

> the Health and Welfare Fund or otherwise. The decision of the Trustees shall be binding upon all persons dealing with the Health and Welfare Fund or claiming any benefits thereunder.

(Section 2.2.) Section 7.1 vests administration of the trust fund "wholly in the Trustees" and grants the trustees the power to "obtain and evaluate all statistical and actuarial data which may be reasonably required with respect to the administration of the Health and Welfare Plan" and to make such other rules and regulations as may be necessary for the administration of the Plan. Section 7.2(l) authorizes the trustees to "[p]repare, promulgate and issue rules and regulations pertaining to application for benefits of the Fund, eligibility requirements to participate in the same and types and kinds of benefits to be secured from proceeds of the Fund."

B.

Plaintiffs filed suit in 1991 against the plan and its trustees, claiming that the trustees breached their fiduciary duties and improperly discriminated against them by charging them a higher contribution rate than that charged to members of Local 522. The case was submitted to the court on the basis of a stipulated record. In granting judgment in defendants' favor on the breach of fiduciary duty claim, the court relied on Sixth Circuit precedent holding that the trustees of a multi-employer welfare benefit plan do not act in a fiduciary capacity in amending the terms of a plan to protect the plan's financial solvency. The court dismissed the discrimination claim, concluding that plaintiffs had not demonstrated that defendants discriminated against them with respect to a right vested under ERISA.

II.

Plaintiffs challenge the trustees' decision to set individual contribution rates for each local on two grounds. First, they claim that the trustees breached their fiduciary duty to the members of Local 633, in violation of ERISA § 504, 29 U.S.C. § 1104. Second, they claim

that the trustees' decision constituted discrimination prohibited by ERISA § 409, 29 U.S.C. § 1109. We consider each argument in turn.

A.

Alleged Breach of Fiduciary Duty

The plan at issue is an employee welfare benefit plan as defined under ERISA, 29 U.S.C. § 1002(1), as it provides medical, health and life benefits. As the Supreme Court recently cautioned, ERISA does not create a substantive entitlement to such benefits, and employers and plan sponsors are generally free to adopt, modify or terminate such plans "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995). "Nor does ERISA establish minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans." *Id.* Thus, plaintiffs had no vested right to continuation of the same schedule of benefits or the same contribution rates. Nonetheless, the trustees of the plan are fiduciaries under ERISA, and owe certain duties to the participants of the plan. The questions presented by this case are whether the specific decision at issue is subject to review for compliance with ERISA's fiduciary duties, and, if so, whether plaintiffs demonstrated that the trustees breached those duties.

A person is a "fiduciary," as that term is defined in ERISA § 3(21)(A), only when performing certain functions; e.g., "exercises any discretionary authority or discretionary control respecting management" of a plan. 29 U.S.C. § 1002(21)(A)(i). A fiduciary's functions do not include plan adoption, amendment, design or termination. Thus, it has long been the rule that an employer or plan sponsor does not act in a fiduciary capacity when adopting, modifying or terminating a welfare benefit plan. *Curtiss-Wright Corp.*, 115 S. Ct. at 1228 (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990)).[2] "When employers undertake those actions, they do not act as fiduciaries, but are analogous

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[2] The Supreme Court recently extended this rule to pension benefit plans in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996).

to the settlors of a trust[.]" *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1789 (1996) (citations omitted).

In *Pope v. Central States Health and Welfare Fund*, 27 F.3d 211 (6th Cir. 1994), this court extended the rule announced in *Adams* to a multi-employer welfare benefit plan such as the plan at issue here. The court explained:

> The trustees of a multi-employer plan do not act in the role of employers when enacting plan amendments which simply affect the allocation of an asset pool among participants and beneficiaries. However, multi-employer plan trustees assume a position analogous to that of a single-employer plan administrator when they amend a plan to protect its financial stability. As in cases involving single-employer plans, the policy encouraging employers to establish welfare benefit plans is served by permitting trustees of multi-employer plans to amend such plans without fiduciary considerations.

Id. at 213 (citations omitted).

Relying on *Pope*, the district court held that the trustees' decision to set independent contribution rates for each local was not subject to review for compliance with fiduciary duties. Plaintiffs contend that *Pope* does not apply because a decision of plan trustees is insulated from review for compliance with fiduciary duties only when the decision takes the form of a plan amendment, as it did in *Pope*. Despite the fact that the trustees' decision was unanimous, while the plan may be amended "in any respect at any time" by a majority vote of the trustees, plaintiffs contend that the lack of a formal amendment renders the trustees' decision subject to review for compliance with fiduciary obligations.

We are persuaded that *Pope* does not apply, although not entirely for the reasons advanced by plaintiffs. The lack of a formal amendment certainly provides a basis on which to distinguish *Pope*. Equally important, however, is the fact that the decision at issue was not one which affected plan design or which altered any existing plan terms.

Rather, the decision was an administrative one, squarely within the powers of the trustees to make, but one which did not "modify" or "amend" the plan. Thus, the trustees, in making this decision, did not act in a manner analogous to settlors of a trust, but, rather, as administrators exercising the discretionary authority granted to them under the plan.

This means, of course, that the trustees' actions are subject to review for compliance with ERISA's fiduciary obligations. Based upon the broad grant of powers to the trustees, however, we review the trustees' actions to determine only if they were arbitrary and capricious. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Whisman v. Robbins*, 55 F.3d 1140, 1144 (6th Cir. 1995) (plan provisions similar to those in this case entitled trustees to arbitrary and capricious standard of review). A determination by plan trustees will not be found to be arbitrary and capricious if it is rational in light of the plan's provisions. *Perry v. United Food and Commercial Workers Dist. Unions 405 and 442*, 64 F.3d 238, 242 (6th Cir. 1995) (citing *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 984 (6th Cir. 1991)).

> This standard "is the least demanding form of judicial review of administrative action .... When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious."

Perry, 64 F.3d at 242 (citation omitted).

Plaintiffs claim that the trustees breached their fiduciary duties as set forth in ERISA § 504, 29 U.S.C. § 1104(a)(1),[3] by choosing to

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[3] Plaintiffs rely on § 1104(a)(1)(A), (B) and (D), which provide that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> **(A)** for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries;
>
> ....

discriminate against the plaintiffs because they belonged to a different local. According to plaintiffs, the trustees breached their duty of loyalty as well as their obligation under the plan not to divert any benefit for purposes other than for the exclusive benefit of the participants. The sole evidentiary basis for plaintiffs' argument is the fact that the plan's trustees were drawn from Local 522, an arrangement to which Local 633 agreed upon joining the plan. The fact that Local 633 was not represented on the board of trustees is not alone wrongful, however. As noted, the composition of the trustee body for a union-sponsored plan such as this is governed by LMRA § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B), which requires only that employees and employers have equal representation, *not* parity between the representatives of each union. *International Bhd. of Teamsters, Joint Council 18 v. New York State Teamsters Council Health and Hosp. Fund*, 903 F.2d 919, 922 (2d Cir.), *cert. denied*, 498 U.S. 898 (1990). Nor will we infer that the trustees acted improperly merely because they necessarily would be affected by any decision which resolved the need to raise contribution rates. *See Mahoney v. Board of Trustees*, 973 F.2d 968, 971-73 (1st Cir. 1992) (trustees' status as beneficiaries does not necessitate strict standard of review of their decisions; decisions remain subject to arbitrary and capricious standard of review).

Thus, we are left with the simple inquiry whether there was a reasonable basis for the trustees' decision. The answer cannot seriously be debated. The trustees were faced with a situation in which the plan was suffering significant losses that were attributable to the claims history of only one local's members. In light of these losses, the trustees were obligated to increase the contribution rates. Noth-

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(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

. . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

ing in the plan prohibited them from doing so by instituting distinct rates, and their decision to do so appropriately placed the burden of the increased costs on the participants whose claims experience was responsible for those costs.

In reaching this decision, we draw guidance from *Mahoney v. Board of Trustees*, 973 F.2d at 973-74, a case in which the trustees of a multi-employer pension plan significantly increased the size of retirement pensions, but did so unevenly, treating participants who had already retired less favorably than those who were still working. Writing for the court, then-Judge Stephen Breyer held that this decision was not arbitrary and capricious. The court noted that increased pensions would require increased contributions, the burden of which would fall on those participants who were still working. It was thus fair to pay those workers the higher benefits. While noting that a perfect match between contribution and benefit level was neither a practical possibility nor legally required, the court recognized that the trustees' effort to achieve a reasonable level of parity was not arbitrary and capricious.

Just as it was reasonable for the trustees in *Mahoney* to attempt to match the level of benefit with the level of contribution, it was reasonable for the trustees in this case to match the level of contribution with the level of benefit provided. We thus conclude that the trustees' decision to institute independent contribution rates for each local was not arbitrary and capricious, and affirm the district court's grant of judgment in defendants' favor on this claim

B.

Allegedly Unlawful Discrimination

Plaintiffs also claim that defendants violated ERISA § 510, 29 U.S.C. § 1140,[4] which prohibits discrimination against a participant

[4] Section 1140 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an

for exercising a right protected by the plan or ERISA, or for the purpose of interfering with the attainment of any right to which the participant may become entitled. The district court dismissed plaintiffs' claim, holding that no impermissible discrimination occurred because the trustees did not interfere with a vested right to benefits. This court recently held, however, that § 1140 "prohibits interference with rights to which an employee `may become entitled' under `an employee benefit plan' and does not limit its application to benefits that will become vested." *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996).[5] We nonetheless affirm the district court's decision on two independent grounds.

First, a plaintiff under § 1140 must demonstrate that the action at issue was taken with the specific intent to violate ERISA, i.e., that a motivating factor in the defendant's action was the purpose of interfering with the plaintiff's entitlement to benefits. *Shahid*, 76 F.3d at 1411. The record is devoid of evidence supporting this element of a § 1140 claim. Rather, the record supports the conclusion that the trustees increased the contribution rates, first, to protect the solvency of the plan, and second, in an effort to distribute the cost of benefits fairly between the two locals. Rather than interfering with the attainment of benefits, the trustees' actions insured that the fund would remain solvent, and that each group of participants would receive the benefits for which they paid.

Second, as explained by this court in *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1391 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994), §

> employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter . . .. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

[5] *Shahid* also resolves defendants' argument, not addressed by the district court, that plaintiffs lack standing to assert their claims. The court held that a plaintiff has standing where, but for the alleged wrongful acts, the employee "'would have been in a class eligible to become a member of the plan.'" *Shahid*, 76 F.3d at 1410-11 (quoting *Swinney v. General Motors Corp.*, 46 F.3d 512, 519 (6th Cir. 1995)). Plaintiffs clearly meet that test here.

1140 was enacted primarily to prevent employers from discharging or harassing their employees in order to prevent them from attaining benefits. "`Congress designed [§ 1140] primarily to protect the employment relationship that gives rise to an individual's pension rights.' For conduct to fall within the parameters of § 1140, it `must affect the individual's employment relationship in some substantial way.' Section 1140 `does not purport to protect the financial security of pension funds.'" *Id.* (quoting *West v. Butler*, 621 F.2d 240, 245-46 (6th Cir. 1980) (internal citations omitted). Plaintiffs have neither alleged nor demonstrated that the trustees' actions affected their employment relationships as required by *Adcox*.

In sum, plaintiffs have not demonstrated that the trustees' actions constituted discrimination prohibited under § 1140.

AFFIRMED.